Supreme Court, U.S.
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91-930

CASE NO. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

MURRELL D. FOSTER and
CAROLYN L. FOSTER,
Petitioners,

v.

NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARY-CORINNE CORLEY
Counsel of Record

JOHN F. ARENS
Counsel for Petitioner

THE ARENS LAW FIRM
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501-442-0584

QUESTIONS PRESENTED

1. Does the lifting of an automatic stay in bankruptcy as to a creditor and that creditor's debt and collateral divest the bankruptcy court of subject matter jurisdiction with respect to the creditor, its debt, its collateral, and related issues?

2. Does a debtor in a proceeding under Chapter 12 of the Bankruptcy Code have an absolute right to dismissal of the case, or may the right to dismissal be defeated by a subsequently-asserted claim of fraud, for which conversion to a Chapter 7 proceeding is sought?

3. Assuming that fraud can defeat the Chapter 12 debtor's right to dismissal, does the debtor's unintentional failure to obey an order of the bankruptcy court constitute fraud within the meaning of the statute authorizing the court to convert the case on the basis of fraud committed by the debtor?

LIST OF PARTIES

This action arose in the context of the bankruptcy case of the petitioners, Murrell Dwain Foster and Carolyn Loretta Foster. The herein respondent, North Texas Production Credit Association, was a creditor in the bankruptcy and the proponent of the Motion to Convert Case to a Proceeding Under Chapter 7 of the Bankruptcy Code, from the disposition of which appeal was taken giving rise to the instant petition.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

LIST OF PARTIES iii

TABLE OF CONTENTS iv

OPINIONS BELOW v

JURISDICTION vi

CONSTITUTIONAL PROVISIONS AND STATUTES vii

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 3

CONCLUSION 16

APPENDIX 17

OPINIONS BELOW

The U.S. Bankruptcy Court for the Northern District of Texas filed an opinion report at 121 B.R. 961 (Bkrtcy. N.D. Tex 1991), denying the petitioners' motion for voluntary dismissal of their Chapter 12 bankruptcy, and granting the respondent's Motion to Convert the case to a proceeding under Chapter 7. The U.S. District Court for the Northern District of Texas affirmed the bankruptcy court in an unreported opinion. Finally, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court *per curiam* and without opinion.

JURISDICTION

This case arises from an appeal to the Court of Appeals for the Fifth Circuit from a decision entered by the U.S. District Court for the Northern District of Texas, Lubbock Division, affirming the judgment of the U.S. Bankruptcy Court for the Northern District of Texas, Lubbock Division, granting the motion of the respondent, North Texas Production Credit Association, for conversion of the petitioners' Chapter 12 bankruptcy case to a proceeding under Chapter 12. The bankruptcy court's decision was entered on 27 November 1990. The notice of appeal therefrom was timely filed on 30 November 1991.

The district court's jurisdiction was predicated upon 28 U.S.C. § 158(a). That court's judgment was entered on 27 December 1990. The notice of appeal therefrom was timely filed on 02 January 1991.

The Court of Appeals' jurisdiction was based upon 28 U.S.C. § 1291. Its decision was entered on 09 September 1991.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

11 U.S.C. § 362(d)

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if —

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

11 U.S.C. § 1208(b)

(b) On request of the debtor at any time, if the case has not been converted under section 706 of 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. § 1208(d)

(d) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

STATEMENT OF THE CASE

This proceeding arises from the affirmance by the U.S. Court of Appeals for the Fifth Circuit of the judgment of the U.S. District Court, Northern District of Texas, affirming the denial by the U.S. Bankruptcy Court, Northern District of Texas, Lubbock Division, of a Chapter 12 debtors' Motion for Voluntary Dismissal, and the affirmance of the bankruptcy court's grant of a creditor's Motion to Convert.

Prior to the filing of the above-referenced motion, the bankruptcy court had entered an order which by its terms lifted the automatic stay in bankruptcy as to the North Texas Production Credit Association (hereinafter "NTPCA"), allowing NTCPA to pursue its state common law remedies against the debtors, Murrell and Carolyn Foster (hereinafter "the Fosters"), who are the instant petitioners.

After the automatic stay was lifted, NTCPA sent a notice of foreclosure to the Fosters, who in turn tendered payment pursuant to that notice. The Fosters' tender was refused, and the Fosters commenced an action seeking equitable relief in the state district court in and for Deaf Smith County, Texas (hereinafter referenced as the "state court petition"). An *ex parte* temporary restraining order was duly sought and issued pursuant to the verified allegations in the state court petition. The state court petition was removed to the U.S. District Court for the Northern

District of Texas prior to a hearing on the merits of said petition.[1]

The Fosters duly filed a motion for remand. NTPCA filed a motion to refer the case to the bankruptcy court, which the district court granted on the narrow grounds that the petition for removal should have first been filed in the bankruptcy court, which the party seeking removal claimed had jurisdiction. The Fosters' Motion for Remand was never determined by the bankruptcy court, and remains pending.

At the same time as the Fosters filed their state court petition, they filed a Motion for Voluntary Dismissal in their bankruptcy. After that Motion was filed, NTPCA filed a Motion to Convert.

Those motions were taken up by the bankruptcy court on 26 November 1990. The Fosters' Motion for Voluntary Dismissal was denied; NTPCA's Motion to Convert was granted.

Thereafter, the Fosters timely filed their Notice of Appeal in the district court. A stay pending appeal was granted, and expedited appeal ordered. The District Court affirmed the lower court's ruling, and appeal to the Fifth Circuit followed. That court affirmed *per curiam* without opinion.

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[1]The foreclosure was subsequently re-noticed, and was resisted by the Fosters because, *inter alia*, the notice was defective. NTPCA conceded the defect and foreclosure was again postponed. It was then noticed for 04 December 1990; that foreclosure was stayed by the district court pending disposition of the appeal by that court. Finally, the sale was re-noticed for 01 January 1991, and took place on that date.

REASONS FOR GRANTING THE WRIT

1. The lifting of an automatic stay in bankruptcy as to a creditor and that creditor's debt and collateral divests the bankruptcy court of subject matter jurisdiction with respect to the creditor, its debt, its collateral, and related issues.

NTPCA sought, and obtained, a lift of the automatic stay in order to pursue its state rights against the Fosters. In lifting the automatic stay, the bankruptcy court relinquished any jurisdiction it may have had to adjudicate disputes between the Fosters and NTPCA.

Subsequent to the lifting of the automatic stay as to NTPCA, NTPCA instituted non-judicial foreclosure as to the real property securing the Fosters' promissory notes with NTPCA. The Fosters in turn asserted their state law remedies by obtaining a state court injunction of that foreclosure. These actions were founded in state law. Resort to state law could be had because the bankruptcy court had relinquished jurisdiction.

However, NTPCA protested the utilization of state law remedies by the Fosters. This protest took the form of removal to federal court and transfer to bankruptcy court of the action filed by the Fosters in state court, which action raised state common law defenses to the non-judicial foreclosure. After the proceeding was transferred to the bankruptcy court, NTPCA filed its motion to convert, which was predicated on the claims which the Fosters sought to litigate in state court.

The Fosters believe that the bankruptcy court improperly asserted subject matter jurisdiction, and ask this Court to grant certiorari to determine the proper scope of the bankruptcy court's subject matter jurisdiction subsequent to the lift of the automatic stay as to NTPCA, its debt and the collateral.

The circuit and district court cases which have addressed this issue have reached contradictory results.

In *Wilson v. Bill Barry Enterprises, Inc.*, 822 F.2d 859 (9th Cir. 1987), a creditor had obtained lift of the automatic stay imposed under the Bankruptcy Code in order to pursue an unlawful detainer action in state court. 822 F.2d at 860. The order entered by the bankruptcy court granted the relief from stay "[i]n the event that [the debtor] did not make [ordered] rental payments." *Ibid.*

The debtor in turn pursued its right to reinstatement in the state court. 822 F.2d at 860. The creditor removed to federal court, then sought dismissal on three grounds, only one of which is here relevant:

> First ... that the state court lacked jurisdiction because the petition infringed upon the exclusive jurisdiction of the bankruptcy court. Because the federal court's jurisdiction was derived from the state court, it also lacked jurisdiction.

Ibid. The district court agreed, entering an order of dismissal from which the debtor appealed. *Id.* at 860-861.

The Ninth Circuit reversed. 822 F.2d at 862. In so ruling, the court stated:

> Because of this statutory structure, the bankruptcy court's lifting of the automatic stay to allow the Wilsons to seek termination of the lease included Barry's right to petition for relief from termination, if declared. Thus, while the bankruptcy court had jurisdiction over Barry's right to seek reinstatement, it relinquished its jurisdiction when it granted relief from the automatic stay. As a consequence, the Orange County Superior Court had jurisdiction to hear Barry's petition.

Id. at 861.

Other court decisions have suggested that the assertion of subject matter jurisdiction subsequent to the lifting of the automatic stay is discretionary.

For example, in *In re Ridgemont Apartment Associates*, 105 B.R. 738 (Bkrtcy. N.D. Ga. 1989), the bankruptcy court stated:

> When this court terminate[d] the stay, it ... remove[d] the bankruptcy restraints prohibiting a claimant's exercise of ... non-bankruptcy rights or remedies with regard to the matter for which the stay was granted.

Ibid. The court then noted that the creditor "sought relief from the automatic stay to permit the exercise of ... non-bankruptcy remedies regarding its collateral". *Ibid.* The court concluded:

> [T]he bankruptcy court ... permitted the creditor to invoke the state court jurisdiction ...
>
> This court should not, and will not, disturb the state court ... in the exercise of its jurisdiction absent unusual and compelling circumstances.

Ibid. Finally, the court noted that:

> [t]he issue is ... whether this court should reimpose a stay and reassert its exclusive jurisdiction ... This court is of the opinion that it should not.

Ibid. Hence, the court indicated that the assertion of subject matter

jurisdiction was discretionary, leaving open the possibility that it might do so in an appropriate case, a result contrary to that announced by the Ninth Circuit.

A more strict result was reached by the bankruptcy court in *In re Terramar Mining Corporation*, 70 B.R. 875, 877 (Bkrtcy. M.D. Fla. 1987). In that case, the automatic stay had once been lifted, and the court declined to take jurisdiction of a dispute between the creditor and the debtor. In so declining, the court stated that it " ... [wa]s satisfied there is no statutory authority whatsoever in the Bankruptcy Code to reinstate an automatic stay once the stay has been lifted."[2]

A seemingly opposite result was reached in *In re Fricker; Fricker v. First Pennsylvania Bank, et al.*, 113 B.R. 856 (Bkrtcy. E.D. Pa. 1990).

Fricker involved an adversary proceeding in which the debtors sought to attack a sheriff's sale of their residence and the underlying obligation. 113 B.R. at 858-59. As to the relevant issue, the bankruptcy court stated:

> An action in which a debtor seeks to set aside a pre-petition sale of valuable property which, if set aside, would clearly be property of the debtor's estate, should generally be considered as not only a matter related to the debtor's bankruptcy case, but also may well be a core proceeding ...

Id. at 864. The court then held that the prior grant of relief from the automatic stay should not bar its exercise of discretionary jurisdiction

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[2]The foreclosure sale at issue in *Terramar* was ultimately enjoined because the lift of stay was qualified in a manner that prohibited the sale. 70 B.R. at 877.

because "while we believe that granting relief from the stay ... diminishes significantly the estate's interest in the [involved] property", in the case at bar the estate's interest remained significant because the debtor sought to bring the property back into the estate. *Ibid.*

Fricker is not on all fours with the instant case. Despite factual differences, because *Fricker* seems to advocate the assertion of subject matter jurisdiction over disputes between a debtor and a creditor when the automatic stay has been lifted, its holding contradicts that of the Ninth Circuit. With the instant ruling by the Fifth Circuit, a split in the circuits now exists. The need for this Court's interpretation of the relevant statute is thus paramount.

Moreover, this case presents a related issue of whether the respondent was a real party in interest with standing to seek conversion.

Remedy for fraud by a debtor in a Chapter 12 may only be sought by a "party in interest". 11 U.S.C. § 1208(d). The term "party in interest" is not defined in the Code. The legislative history indicates that the decision as to whether a claimant is a "party in interest" should be made on a case by case basis, with the caveat that the restriction of action to a party in interest is intended to prohibit the bankruptcy courts from acting *sua sponte*. *Collier on Bankruptcy*, ¶ 304.1, footnote 18.

From this, it would follow that NTPCA was not a party in interest because it had obtained a lift of the automatic stay in order to pursue its secured claims outside of bankruptcy, and by the terms of the Fosters'

Chapter 12 plan, it is clear that NTPCA had no unsecured claim. Since no claim of NTPCA remained to be adjudicated by the bankruptcy court under the plan of reorganization, NTPCA had no stake in the outcome of the bankruptcy and was not a real party in interest. If the Motion to Convert was made by an entity lacking standing to do so, subject matter jurisdiction would not vest in the bankruptcy court.

The petitioners urge this Court to grant certiorari to issue a definitive construction of section 1208(d). Such direction by this Court will protect the manifest intention of Congress to limit the class of entities which may defeat the debtor's right to protection and the circumstances under which that right may be curtailed.

2. A debtor in a proceeding under Chapter 12 of the Bankruptcy Code has an absolute right to dismissal of the case, which once asserted may not be defeated by a subsequent claim of fraud for which conversion to a Chapter 7 proceeding is sought.

The Chapter 12 debtor has an absolute right to voluntarily dismiss its proceeding:

> (b) On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. § 1208(b).

In the instant case, the motion to convert was filed after the motion for voluntary dismissal. The two motions were taken up on the same day. Conversion was sought under 11 U.S.C. § 1208(d).

NTPCA supported its attempt to procure conversion of the Fosters' Chapter 12 by alleging fraud. That allegation purported to invoke section 1208(d) of the Bankruptcy Code, which provides as follows:

> (d) On request of a party in interest, and after notice and a hearing, the court may ... convert a case ... to a case under Chapter 7 ... upon a showing that the debtor has committed fraud in connection with the case.

11 U.S.C. § 1208(d). This section is in apparent conflict with the absolute right to dismissal set forth in § 1208(b).

Four cases have attempted to resolve this conflict or faced related issues.

In *In re Reinbold*, 110 B.R. 442 (Bkrtcy. D.S.D. 1990), the alleged fraud involved collateral intended to be conveyed to a creditor pursuant to the plan of reorganization.

The debtor Reinbold filed his Chapter 12 petition on 15 October 1987, and a plan of reorganization was confirmed on 22 July 1988. 110 B.R. at 443. As part of that plan, the debtor was required to surrender to the creditor Dewey County Bank (DCB) all farm equipment as to which DCB had a first lien or security interest. *Ibid.* Thereafter, DCB discovered that a series of lease-back/sales had occurred which resulted in the transfer of the equipment as to which the liens existed. *bid.*

The *Reinbold* court observed that "conversion to a Chapter 7 liquidation is admittedly a harsh result". 110 B.R. at 446. The court then held that conversion in that case was warranted because of a profound series of patently fraudulent actions by the debtor. However, in so holding, the court did not address the conflict between sections 1208(b) and 1208(d) but seemed to assume that the provisions of the two were compatible.

The Bankruptcy Court for the District of Utah considered similar issues in *In re Caldwell*, 101 B.R. 728 (Bkrtcy. D. Utah 1989).

In *Caldwell*, conversion was based on the debtor's fraudulent concealment of nearly $400,000 worth of assets. 101 B.R. at 730-731. The concealment was apparently part of a "complex" transaction between the debtor, "his son and others, and their various corporate entities". *Id.* at 731. Regarding that transaction, the testimony of the debtor "was vague and

confusing and the exhibits received into evidence only seem[ed] to scratch the surface of the dealings". *Ibid.*

After a lengthy discussion of the facts constituting the alleged fraud, the *Caldwell* court applied a "clear and convincing" standard to the question of whether fraud had occurred. 101 B.R. at 733. The court quoted with approval from Herbert, *Once More Unto the Breach, Dear Friends*, 16 Cap.U.L.Rev. 325, for the proposition that the "rights of others to seek conversion are narrowly circumscribed". *Id.* at 734, quoting Herbert at 352-353.

The Caldwell court ordered conversion, holding as follows:

> The Motion before the court is for conversion to Chapter 7. That is a harsh result for Caldwell who may be solvent. The court is aware that its ruling may provide a basis for future proceedings in this Chapter 7 case. However, all those consequences were foreseeable to Caldwell and his attorneys. *Absent Caldwell's election under section 1208(b) to dismiss this case,* he must now suffer the consequences of his actions.

110 B.R. at 740 (emphasis provided).

The *Caldwell* court's qualification is critical, in that it acknowledges that *if* the debtor had sought dismissal, conversion would not have thereafter been permitted. That is precisely the circumstance in the case at bar, and precisely the issue as to which this Court's guidance is needed.

Two other cases have resulted in conversion as a consequence of the debtor's fraud in connection with the bankruptcy case.

In *In re Graven*, 101 B.R. 109 (Bkrtcy. W.D.Mo. 1989), conversion was ordered upon discovery of an elaborate attempt to defraud creditors

through a transfer of property to a sham corporation and trust. 101 B.R. at 110-111. In the course of reciting its ruling, the *Graven* court noted that its position was the minority one. *Id.* at 113.

Finally, in *In re Zurface*, 95 B.R. 527 (Bkrtcy. S.D.Ohio 1989), the debtors transferred their property on the eve of foreclosure to a wholly owned corporation and for inadequate consideration. 95 B.R. at 535. The court granted the motion to convert on a showing of a history of activities designed to defraud creditors by the transfer and concealment of assets. *Id.* at 537-538.

The *Zurface* court did not attempt to resolve the conflict between sections 1208(b) and 1208(d), apparently because the debtor did not seek dismissal prior to the filing of the motion to convert. Hence, *Zurface* offers no indication of the court's position on point.

The gravamen of the request for certiorari as to this issue is whether a subsequently filed motion to convert can defeat the motion for dismissal already before the court. Section 1208(b) limits dismissal only if conversion had been *ordered*. Since it had not been *ordered*, dismissal should have been automatic. To otherwise construe section 1208(b) is to give the language of that section meaning other than that of the ordinary words of the section.

Because of the profound significance of the implicit meaning of the Fifth Circuit's order in this case, certiorari is imperative to resolve a problematic interpretation of the Bankruptcy Code. Compounding the

importance of the Fifth Circuit's implicit endorsement of the lower court's resolution of the conflict between section 1208(b) and 1208(d) is the issue of NTPCA's apparent lack of standing to seek conversion that query, discussed at page 7-8, *supra*, which enhances the urgency for the grant of certiorari in this case.

3. Assuming that fraud can defeat the Chapter 12 debtor's right to dismissal, the debtor's unintentional failure to obey an order of the bankruptcy court does not constitute fraud within the meaning of the statute, so that the court may not convert the case to a Chapter 7 proceeding.

The bankruptcy court based its grant of the Motion to Convert on the failure of the Fosters to obey an order of the court. The uncontroverted evidence before the Court at all phases of this case has been that the debtors did not *refuse* to obey any lawful order of the court; rather, they attempted at all junctures to obey all lawful orders of the court, but were thwarted in their efforts to do so, apparently by their own attorneys.

The order which the Fosters are alleged to have failed to obey is an order of the bankruptcy court entered on 17 August 1991. Pursuant to that order, certain documents of conveyance were to be signed by the Fosters. However, the uncontroverted evidence before the bankruptcy court was that the then-attorneys for the debtors provided documents for the Fosters to sign which did not contain the agreement of the parties. No evidence to the contrary was ever presented to the court by any party.

In cases which discuss refusal to obey a court's order as the basis of a denial of discharge, courts have consistently held the failure must be tantamount to a willful refusal. *See, e.g., In re Jones; Friendly Finance Discount Corp. v. Jones*, 490 F.2d 452, 456 (5th Cir. 1974) (grant of

discharge affirmed).

In *Jones*, as in the present case, the debtor's failure to obey the court's order was attributable to the debtor's attorney. 490 F.2d at 455. The bankruptcy court allowed the discharge, and the circuit court affirmed. *Id.* at 456. In so holding, the Fifth Circuit quoted with approval from a Second Circuit holding that "'[t]he denial of a discharge can work a serious deprivation upon a debtor, and there are many circumstances where a bankrupt's disobedience [is] ... excusable.'" *Ibid*, quoting *In re Kokoszka*, 479 F.2d 990, 997 (2nd Cir. 1973).

There is no rational basis for differently defining fraud where conversion is sought and where denial of discharge is sought. Hence, the Fifth Circuit has contradicted itself and the Second Circuit by affirming the lower court in the case at bar.

Because the bankruptcy court's holding that the failure to obey an order of the court constituted fraud sufficient to warrant conversion was affirmed without opinion by the Fifth Circuit, this Court should grant certiorari to determine the proper construction of the applicable sections of the Bankruptcy Code. Without guidance from this Court, an important area of federal law will be subject to inopportune interpretation by bankruptcy courts with only the instant circuit court affirmance as precedence.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted, and the cause remanded to the district court for further proceedings after determination of the herein presented questions.

Respectfully submitted,

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Counsel of Record

John F. Arens
Counsel for Petitioner

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

In re:	§	In Proceedings Under Chapter 12 of
	§	the Bankruptcy Code
MURRELL D. FOSTER and	§	No. 589-50331-12
CAROLYN FOSTER,	§	
	§	
Debtors.	§	

ORDER CONVERTING CASE TO CHAPTER 7

On this date came on to be heard the Debtors' motion to dismiss the captioned proceedings under Chapter 12 of the Bankruptcy Code and the motion of North Texas Production Credit Association to convert these proceedings to a liquidation under Chapter 7 of the Bankruptcy Code. After having heard the evidence and argument of counsel and considering this matter the court announced on the record its reasons for conversion of this case to Chapter 7.

It is therefore ORDERED that:

1. The Debtors' motion to dismiss is denied.

2. This case is immediately converted to a liquidation under Chapter 7 of the Bankruptcy Code. The United States Trustee is requested to immediately appoint a Chapter 7 trustee in this proceeding.

DATED: November 26, 1990

JOHN C. AKARD, BANKRUPTCY JUDGE

The Clerk shall furnish copies to:

Attorneys for the Debtors: Arens and Alexander, Attorneys at Law, 31 E. Center, Center Court Square, P.O. Box 1928, Fayetteville, AR 72702 and Donald L. Davis, Donald L. Davis, P.C., 902 Main Street, P.O. Box 602, Vega, TX 70902;

Attorney for North Texas Production Credit Association: Mr. H. DeWayne Hale, Hale, Spencer, Pronske & Trust, P.C., 901 Main Street, LB 131, Dallas, TX 75202;

Chapter 12 Trustee: Mr. Walter O'Cheskey, Trustee-in-Bankruptcy, 3223 S. Loop 289, Suite 315, Lubbock, TX 79423; and

United States Trustee: Mrs. Mary Frances Durham, United States Trustee's Office, United States Department of Justice, 9E-23 Federal Building, 1100 Commerce Street, Dallas, TX 75242.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-1039

IN RE: MURRELL D. FOSTER and
CAROLYN FOSTER,

Debtors,

MURRELL D. FOSTER and
CAROLYN FOSTER,

Appellants,

VERSUS

NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,

Appellee

Appeal from the United States District Court
For the Northern District of Texas
(CA 5 90 233 C)

(September 9, 1991)

Before BROWN, DAVIS, AND BARKSDALE, Circuit Judges.

PER CURIAM:[1]

AFFIRMED. See Local Rule 47.6.

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense to the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

In re:

MURRELL D. FOSTER and CAROLYN FOSTER,	)	Case No. 589-50331
	)	Chapter 12
Debtors	)	

* * *

MURRELL D. FOSTER and CAROLYN FOSTER,	)	
Appellants,	)	
v.	)	
NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,	)	
	)	Civil Action No.
Appellee.	)	CA-5-90-233-C

APPEAL FROM THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
JOHN C. AKARD, BANKRUPTCY JUDGE, PRESIDING

ORDER

Came on to be heard the appeal from the order of the Bankruptcy Court denying the debtors' motion to dismiss the chapter [sic] 12 proceedings and granting the motion of North Texas Production Credit Association to convert to a liquidation under chapter [sic] 7 of the Bankruptcy Code. After considering the argument of counsel, together with

the review of the transcript of proceedings before the Bankruptcy Court, the Court is of the opinion that the order converting the case to a chapter [sic] 7 proceeding should be in all things **AFFIRMED.**

This Court adopts as its findings those set forth in the transcript of proceedings before Bankruptcy Court beginning on page 57 thereof. The Court agrees with the reasoning set forth in the case of *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989). When the facts show that the debtors have abused the legal process and the bankruptcy process through fraud, the bankruptcy court has the authority to convert a chapter [sic] 12 proceeding to a chapter [sic] 7 liquidation, even though the debtors have filed a motion to dismiss the chapter [sic] 12 proceeding. The debtors in the case *sub judice* have used the bankruptcy proceedings as a subterfuge and as a "shell game," reflecting a pattern of intent to hinder, delay and defraud creditors.

This court hereby lifts the temporary stay and dissolves the temporary injunction heretofore ordered on December 4, 1990.

SO ORDERED.

The Clerk shall furnish a copy hereof to each attorney of record.

Dated December 27, 1990.

SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

In re:

MURRELL D. FOSTER and CAROLYN FOSTER,	)	Case No. 589-50331 Chapter 12
Debtors.	)	

* * *

MURRELL D. FOSTER and CAROLYN FOSTER,	)	
Appellants,	)	
v.	)	
NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,	)	
Appellee.	)	Civil Action No. CA-5-90-233-C

APPEAL FROM THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
JOHN C. AKARD, BANKRUPTCY JUDGE, PRESIDING

JUDGMENT

For the reasons set forth in the order of even date herewith, the Court enters the following judgment:

IT IS ORDERED, ADJUDGED AND DECREED that the order of the Bankruptcy Court dated November 27, 1990, be and the same is in all things affirmed.

The Court hereby lifts the temporary stay and dissolves the temporary injunction heretofore ordered on December 4, 1990.

The Clerk shall furnish a copy hereof to each attorney of record.

Dated December 27, 1990.

SAM R. CUMMINGS
United States District Judge

Supreme Court, U.S.
FILED
JAN 8 1992
OFFICE OF THE CLERK

CASE NO. 91-930

IN THE

United States Supreme Court

OCTOBER TERM, 1991

MURRELL DWAIN FOSTER
AND CAROLYN LORETTA FOSTER,
Petitioners,

v.

NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT,
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CERTIFICATE OF INTERESTED PERSONS

Respondents are aware of no persons who have, or may have, a financial interest in the outcome of the appeal other than the following:

Murrell Dwain Foster
Route 5, Box 113
Hereford, Texas 79045
(Last Known Address)

Carolyn Loretta Foster
Route 5, Box 113
Hereford, Texas 79045
(Last Known Address)

Myrtle McDonald
Chapter 7 Trustee
P. O. Box 2426
Lubbock, Texas 79408

North Texas Production Credit Association
Dwyatt Bell, President
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TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
I. STATEMENT OF JURISDICTION	1
II. STATEMENT OF ISSUES	1
III. STATEMENT OF THE CASE	2
A. PROCEDURAL BACKGROUND	2
B. SUBSTANCE OF THE DISPUTE BEFORE THIS COURT	5
IV. REASONS FOR NOT GRANTING THE WRIT	6
A. The lifting of the automatic stay by the Bankruptcy Court, with the agreement of the Fosters, to allow the PCA to foreclose its real property liens is not a basis for granting the Writ as: (1) the Conversion Order appealed from does not arise out of nor is it related to the lifting of the automatic stay; and (2) the lifting of the stay does not deprive the Bankruptcy Court of jurisdiction over the Fosters	6
1. The Conversion Order appealed from does not arise out of nor is it related to the lifting of the automatic stay	6
2. The lifting of the stay does not deprive the Bankruptcy Court of jurisdiction over the Fosters	7
B. The Fosters demonstrate no basis to grant a Writ, as the United States Courts of Appeals are uniform that a Bankruptcy Court may convert a Bankruptcy Case from Chapter Twelve to Chapter Seven even if the Debtor seeks dismissal	9

Page

C. Writ should not be granted as the fraud of the Fosters was sufficient to convert their case to Chapter 7 11

D. The Fosters have demonstrated no basis to grant a Writ, as the PCA had standing to seek conversion of the Bankruptcy Case 14

TABLE OF AUTHORITIES

11 U.S.C. §101 *et seq* 2

11 U.S.C. §1208(d) 2,9,13,14

28 U.S.C. §1254(1) 1

H.R. Conf. Rep. No. 958, 99th Cong., 2d Sess., 132 Cong. Rec. S15, O76 (Daily Ed. Oct. 3, 1986) 9

In re Caldwell, 101 B.R. 728 (Bankr. D. Utah 1989) 11,13

In re Desmarais, 33 B.R. 27 (Bankr. D. Me 1983) 8

In re Foster, 105 B.R. 746 (Bankr. M.D. Ga. 1989) 8

In re Murrell D. and Carolyn L. Foster, 121 B.R. 961 (N.D. Tex. 1990) 7,9

In re Fricker, 113 B.R. 856 (Bankr. E.D. Pa. 1990) 8

In re Graven, 936 F.2d 378 (8th Cir. 1991) 10,12

In re Little Creek Dv. Co., 779 F.2d 1068, 1071 (5th Cir. 1986) 11

In re Oakes, 129 B.R. 477, 479 (Bankr. N.D. Ohio 1991) 7,8

In re Reinbold, 110 B.R. 442, 445 (Bankr. D.S.D. 1990) 9

In re Ridgemont Apartment Associates, 105 B.R. 738 (Bankr. N.D. Ga. 1989) 8

In re Timbers of Inwood Forest Associates, Ltd., 108 S.Ct. 626 (1988) 10

In re Zurface, 95 B.R. 527, 529 (Bankr. S.D. Ohio 1989) 9

Wilson v. Bill Barry Enterprises, Inc., 822 F.2d 859 (9th Cir.) 7,8

CASE NO. 91-930

IN THE

United States Supreme Court

OCTOBER TERM, 1991

MURRELL DWAIN FOSTER
AND CAROLYN LORETTA FOSTER,

Petitioners,

v.

NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT

I. STATEMENT OF JURISDICTION

The Petition for Certiorari arises from a final judgment of the United States Bankruptcy Court for the Northern District of Texas, Lubbock Division, as affirmed by the United States District Court for the Northern District of Texas, Lubbock Division, and as affirmed by the Court of Appeals for the Fifth Circuit. This Court has jurisdiction over certain aspects of this appeal pursuant to 28 U.S.C. § 1254(1).

II. STATEMENT OF ISSUES

1. The only issue properly before this Court if a Writ of Certiorari is granted is whether, by his Order Converting Case to Chapter 7 entered November 27, 1990 (the "Conversion Order"), the Honorable Judge John C. Akard of the United States Bankruptcy Court for the Northern District of Texas, Lubbock

Division (the "Bankruptcy Court") erred in converting the Chapter 12 bankruptcy case of Appellants, Murrell Dwain Foster and Carolyn Loretta Foster (the "Fosters"), from a case under Chapter 12 to a case under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq* (the "Bankruptcy Code"). The Bankruptcy Court converted the case to Chapter 7 in accordance with 11 U.S.C. 1208(d), upon finding that the Fosters had committed fraud in connection with their bankruptcy case upon the Bankruptcy Court, and upon Respondent, the North Texas Production Credit Association (the "PCA"). The United States District Court for the Northern District of Texas, Lubbock Division affirmed the Conversion Order on December 27, 1990, and on September 9, 1991, the Fifth Circuit Court of Appeals affirmed *per curiam*.

2. The Fosters improperly seek to multiply the issues to be considered by this Court to include matters outside the scope of this appeal. The Fosters seek to add questions regarding the jurisdiction of the Bankruptcy Court, and the standing of the PCA to seek conversion.

III. STATEMENT OF THE CASE

A. Procedural Background

3. On June 5, 1989, on the eve of foreclosure sales scheduled by the PCA against certain real property, the Fosters jointly filed in the Bankruptcy Court a Voluntary Petition for Relief under Chapter 12 of the Bankruptcy Code. On July 5, 1989, the Fosters filed with the Bankruptcy Court their Schedules, Statement of Financial Affairs and Chapter 12 Statement (the "Schedules"), which included the Fosters' declaration of exempt property. On August 14, 1989, the PCA timely filed its objection to the Fosters claim of exceptions, primarily because these claimed exemptions included a homestead claim materially different from that claimed at the time the PCA initially made its loan to the Fosters.

4. On January 31, 1990, the Bankruptcy Court entered its Order Confirming Debtors Chapter 12 Plan of Reorganization (the "Confirmation Order"). This Chapter 12 Plan was a consensual Plan proposed by the Fosters and approved by the PCA. However, the Fosters failed to perform under their Chapter 12 Plan. On August 17, 1990, after the PCA filed a motion complaining of the Fosters failure to perform, the Bankruptcy Court entered its Order on Motion to Dismiss Bankruptcy (the "Dismissal Order") which was agreed to by the Fosters both as to form and substance. Both the Confirmation Order and the Dismissal Order directed the Fosters to: (a) vacate and convey to the PCA certain property located in Bowie County and Red River County, Texas (the "East Texas Property"), against which the PCA held a valid lien, in exchange for an agreed credit against their debt to the PCA; and (b) execute loan documents memorializing the restructure of the remaining debt required under the Plan to be repaid. The Dismissal Order directed the Fosters to:

> execute and deliver to the PCA a Special Warranty Deed in a form acceptable to counsel for the Debtor and the PCA, conveying to the PCA the Debtor's real property and improvements in Bowie and Red River Counties ("East Texas Property"), free and clear of all liens, claims, and encumbrances for a credit of $277,000.00 on the present indebtedness of the Debtors to the PCA. Alternatively, the PCA is authorized to foreclose upon the East Texas Property and shall credit the present indebtedness of the Debtors in a bid of not less than $277,000.00.

The Dismissal Order also directed the Fosters "to execute and deliver to the PCA loan and security documents . . . continuing the PCA's pre-petition lien and security interests in the Debtor's real property and improvements in Deaf Smith County, Texas, as described in the Chapter 12 Plan confirmed by this Court on or about January 31, 1990 ("Plan")."

5. After the Fosters failed to comply with the Dismissal Order, and in accordance with the Dismissal Order, the PCA posted the East Texas Property and certain property located in Deaf Smith County, Texas (the "West Texas Property"), against which the PCA held a valid lien, for nonjudicial foreclosure sales to occur on October 2, 1990. On the eve of the scheduled foreclosure sales, the Fosters filed suit against the PCA in Hereford County, Texas (the "State Court Litigation"), and obtained an *ex parte* temporary restraining order without bond, preventing the scheduled foreclosure sales. Among the claims asserted, for the first time ever in their dealings with the PCA and the Bankruptcy Court, the Fosters claimed a two hundred (200) acre homestead in the East Texas Property which was supposed to have been conveyed to the PCA under the Confirmation Order and the Dismissal Order.

6. On October 10, 1990, the PCA removed the State Court Litigation to the United States District Court for the Northern District of Texas, Amarillo Division, and requested that the matter be referred to the Lubbock Bankruptcy Court. On November 1, 1990, the Honorable Judge Mary Lou Robinson for the Amarillo Court entered an Order referring the removed State Court Litigation to the Bankruptcy Court, and the case was assigned Adversary No. 590-5060 (the "Adversary Action"). The Adversary Action is not before the Court, nor was any issue in the Adversary Action before any of the lower courts.

7. On October 1, 1990, the Fosters filed a Motion for Voluntary Dismissal of the Bankruptcy Case with the Bankruptcy Court (the "Dismissal Motion"). However, the Dismissal Motion was not properly served on creditors and parties-in-interest as required under the federal and local Bankruptcy Rules of Procedure until, at the earliest, November 9, 1990. On October 16, 1990, well prior to proper service of the Dismissal Motion, the PCA filed its Motion to Convert Bankruptcy Case to Chapter 7 Case Under Bankruptcy Code Section 1208(d) (the "Conversion Motion").

The Conversion Motion and the Dismissal Motion were set for hearing on November 26, 1990, along with the requests of the Fosters in the Adversary Action for a preliminary injunction, and for a remand of the Adversary Action to state court. Only the Conversion Motion and the Dismissal Motion were reached on November 26, 1990, for the following reasons: (a) the Fosters asked for a continuance of their preliminary injunction request; (b) the Fosters announced that their prior pending request for a temporary restraining order was moot; and (c) the Bankruptcy Court did not take up the remand issue in the Adversary Action as the Chapter 7 trustee to be appointed would succeed as the proper party plaintiff to a number of the claims in that suit. No subsequent hearing on the temporary injunction request or the request for remand of the Adversary Action has been requested or scheduled.

8. On November 26, 1990, after consideration by Judge Akard of the testimony before him, the documents offered into evidence, and the conduct of the Fosters during their bankruptcy case, Judge Akard entered an order converting the Fosters Chapter 12 bankruptcy case to a Chapter 7 liquidation. The evidence presented lead Judge Akard to conclude that conversion was the appropriate remedy for the Fosters fraud upon the Bankruptcy Court, and fraud upon the PCA. These fraud findings were based upon the Debtors sworn misrepresentations as to their homestead in their Bankruptcy Schedules, the misrepresentations of the Fosters in their bankruptcy Plan, the unfulfilled representations of the Fosters to vacate and convey the East Texas Property to the PCA and execute loan documents as required by their confirmed Plan, the failure of the Fosters to comply with the Dismissal Order, and the clear intention of the Fosters to not carry out the promises they made to the PCA and to the Bankruptcy Court.

B. Substance of the Dispute Before This Court

9. The Fosters assert that their bankruptcy case should have been dismissed rather than converted. Alternatively, the Fosters

argue that their bad conduct did not rise to the statutory standard of fraud in connection with their bankruptcy case. However, the recitations by the Fosters in their Brief of Petitioners, p. 14, that they "attempted all junctures to obey all lawful orders of the [bankruptcy] court" is false and specious. Their decision to ignore the Bankruptcy Court's Orders and their own counsel's advice indicates only their bad faith in dealing with the PCA and the Bankruptcy Court. Further, the Fosters provided no evidence to the Bankruptcy Court that the loan documents they refused to execute varied from the terms of their confirmed Plan.

IV. REASONS FOR NOT GRANTING THE WRIT

A. The lifting of the automatic stay by the Bankruptcy Court, with the agreement of the Fosters, to allow the PCA to foreclose its real property liens is not a basis for granting the writ as: (1) the conversion order appealed from does not arise out of nor is it related to the lifting of the automatic stay; and (2) the lifting of the stay does not deprive the Bankruptcy Court of jurisdiction over the Fosters.

1. The Conversion Order appealed from does not arise out of nor is it related to the lifting of the automatic stay.

10. The Fosters attempt to obfuscate the issues which would properly be before this Court if a writ of certiorari is granted. There is no issue of the Bankruptcy Court's jurisdiction over the Conversion Motion. The issue of jurisdiction arises only in the Adversary Action, which is not before this Court, and was not before any of the lower courts. As noted, the PCA was authorized to foreclose its real property liens in October 1990. The Fosters prevented the foreclosures from being held. What the PCA complained of in its Conversion Motion is that the Fosters had misrepresented to the Bankruptcy Court and the PCA their intentions to comply with their Plan. The fact that the Fosters

filed a lawsuit in state court is not why their Chapter 12 case was converted or sought converted, nor was the Conversion Motion "predicated on the claims which the Fosters sought to litigate in state court." (Petition for Writ, p. 3). Further, the Conversion Order had no dispositive effect on the Adversary Action, nor did it constitute an assertion of jurisdiction over the Adversary Action. The Fosters' Chapter 12 case was converted because the Fosters lied about their intentions to convey and vacate the East Texas Property and execute the necessary loan documents, and lied in their bankruptcy Schedules.

11. Further, the proper forum for the Adversary Action is not before this Court, nor was it before the lower appellate court. The Fosters argument that the Bankruptcy Court lacked jurisdiction over the "state law remedies" asserted by the Fosters in the Adversary Action (Petition for Writ, p. 3) goes to and was raised by the Fosters when they requested the Bankruptcy Court remand the Adversary Action to State Court. However, no ruling on the remand request was made by the Bankruptcy Court, nor is any such order before this Court, nor was any such order before the lower appellate courts. The question of the Bankruptcy Court's jurisdiction over the "state law remedies" asserted by the Fosters is therefore irrelevant to the Petition for Writ, and is not a reason to grant the writ. Even given the broadest possible reading of *Wilson v. Bill Barry Enterprises, Inc.*, 822 F.2d 859 (9th Cir.), no conflict between the circuit courts of appeals can be read into the Fifth Circuit's *per curiam* affirmance of the District Court's reported opinion, *In re Murrell D. and Carolyn L. Foster*, 121 B.R. 961 (N.D. Tex. 1990), as no issue of jurisdiction was decided by the lower courts.

2. The lifting of the stay does not deprive the Bankruptcy Court of jurisdiction over the Fosters.

12. The Bankruptcy Court did not relinquish jurisdiction over the Fosters by allowing the PCA to seek foreclosure of its collateral. This argument by the Fosters is without merit. *See*

generally In re Fricker, 113 B.R. 856 (Bankr. E.D. Pa. 1990); *In re Ridgemont Apartment Associates*, 105 B.R. 738 (Bankr. N.D. Ga. 1989); *In re Desmarais*, 33 B.R. 27 (Bankr. D. Me 1983). The Bankruptcy Court could continue to exercise jurisdiction over the Fosters and over the East Texas Property and the West Texas Property until some action was taken compelling the Bankruptcy Court to relinquish jurisdiction. *In re Oakes*, 129 B.R. 477, 479 (Bankr. N.D. Ohio 1991) (relief from stay to pursue collection of collateral, rents, does not constitute relinquishment of jurisdiction over the rents); *In re Foster*, 105 B.R. 746, 748 (Bankr. M.D. Ga. 1989) (after creditor was granted relief from stay to pursue a foreclosure sale, bankruptcy court retained jurisdiction to determine if foreclosure sale should be set aside on procedural grounds).

13. Further, the *Wilson* opinion relied on by the Fosters does not hold that a bankruptcy court relinquishes jurisdiction over property or a dispute by virtue of a lifting of the stay. In *Wilson*, a landlord was allowed relief from the stay to pursue termination of a lease. In state court, the debtor/lessee filed a petition under California law for reinstatement of the lease. This action was removed to federal court, and was dismissed because both the state court and the federal court lacked jurisdiction over the removed action. The Ninth Circuit affirmed the dismissal, because when the stay was originally lifted, the lessee's right to seek reinstatement was eliminated. *Wilson*, 822 F.2d at 860-61. All *Wilson* held was that since the termination of the stay included elimination of the right to seek reinstatement, there was no dispute over which to assert jurisdiction. It is entirely appropriate to "not read *Wilson* to hold that granting relief from stay automatically divests the bankruptcy court of jurisdiction over the estate property involved." *Oakes*, 129 B.R. at 479.

B. The Fosters demonstrate no basis to grant a writ, as the United States Courts of Appeals are uniform that a Bankruptcy Court may convert a Bankruptcy Case from Chapter Twelve to Chapter Seven even if the Debtor seeks dismissal.

14. The protections of the Bankruptcy Code, and Chapter 12 in particular, are reserved for those family farmers who pursue repayment of their debt honestly, and in good faith. *In re Reinbold*, 110 B.R. 442, 445 (Bankr. D.S.D. 1990). This same purpose is found in the legislative history to Chapter 12 which states in relevant part:

> Section 1208 is designed to encourage *good faith and honest dealing* by the debtor throughout his Chapter 12 case. If fraud is found, the case will be dismissed or converted to Chapter 7.

H.R. Conf. Rep. No. 958, 99th Cong., 2d Sess., 132 Cong. Rec. 15076 (Daily Ed. Oct. 3, 1986). *Reinbold*, 110 B.R. at 445 (emphasis supplied). *See also In re Zurface*, 95 B.R. 527, 529 (Bankr. S.D. Ohio 1989). A Chapter 12 case may only be converted to a Chapter 7 liquidation if the Bankruptcy Court finds fraud in connection with the case. 11 U.S.C. § 1208(d).

15. In converting the Fosters Chapter 12 case to Chapter 7, the Bankruptcy Court stated as follows:

> On two occasions the Debtors have promised to vacate the East Texas Property and to convey it to the PCA. They are now attempting to defeat PCA by claiming the East Texas Property is their homestead. This clearly indicates to the Court that they had no intention of carrying out their promise nor of abiding by the Orders of this court. The Court finds that the Debtors, both Mr. Foster and Mrs. Foster, have committed fraud upon the PCA and upon this Court.

16. In affirming the Bankruptcy Court, Judge Cummings of the District Court found from his review of the record that the

Fosters had abused the Bankruptcy Court and had "used the bankruptcy proceeding as a 'shell game' reflecting a pattern of intent to hinder, delay and defraud creditors." *In re Murrell D. and Carolyn L. Foster,* 121 B.R. 961 (N.D. Tex. 1990). By affirming, the Fifth Circuit implicitly held that conversion to Chapter 7 under Section 1208(d) may be ordered even if the debtor seeks dismissal under Section 1208(b).

17. However, the Fifth Circuit opinion is in agreement with the decision of the Eighth Circuit in *In re Graven,* 936 F.2d 378 (8th Cir. 1991). The *Graven* court determined that Sections 1208(b) and 1208(d) of the Bankruptcy Code need to be read together so as to avoid "endless abuse of the bankruptcy process . . ." *Graven,* 936 F.2d at 385. The *Graven* court stated as follows:

> We conclude that the broad purpose of the Bankruptcy Code, including Chapter 12, is best served by interpreting Section 1208(d) to allow a court to convert a case to Chapter 7 upon a showing of fraud even though the debtor has moved for dismissal under subsection (b). Our holding on the interaction of subsections (b) and (d) does not conflict with the express language of subsection (b).

Id.

18. *Graven* went on to hold "that once fraud has become an issue in the case, the court may delay action on a Section 1208(b) motion for dismissal long enough to allow an investigation of the alleged fraud. If fraud is shown, the court may, under 11 U.S.C. § 1208(d), convert the Chapter 12 case to Chapter 7 despite the debtor's motion to dismiss." *Graven,* 936 F.2d at 387. Thus, the only circuit courts of appeal to address this issue are in harmony.

19. This construction of § 1208 is consistent with this Court's analysis of the Bankruptcy Code in *In re Timbers of Inwood Forest Associates, Ltd.,* 108 S.Ct. 626 (1988). In *Timbers,* in deciding whether an undersecured creditor was entitled to post-petition adequate protection, this Court noted that "Statutory

construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . ." *Id.*, 108 S.Ct. at 630. This Court also noted that the construction provided must produce "a substantive effect that is compatible with the rest of the law . . ." *Id.* (citations omitted).

20. Further, the Fifth Circuit has also noted that "Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings." *In re Little Creek Dv. Co.*, 779 F.2d 1068, 1071 (5th Cir. 1986). In *Little Creek*, the court determined that a bankruptcy proceeding must be filed in good faith to prevent abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefitting them in any way or to achieve reprehensible purposes. Moreover, a good faith standard "protects the jurisdictional integrity of the bankruptcy courts. . ." *Id.* at 1072. Analyzing a debtor's request to dismiss a case in light of the overriding good faith requirements of the Bankruptcy Code is entirely consistent with *Timbers* and *Little Creek*. The Fosters have proven themselves to not be honest debtors, and Judge Akard properly so found.

C. Writ should not be granted as the fraud of the Fosters was sufficient to convert their Case to Chapter 7.

21. As to an issue of fact raised by the Fosters, the standards applied by Judge Akard and approved by the Fifth Circuit on conversion for fraud do not create a conflict between the United States courts of appeals, nor do they constitute so for a departure from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its power of supervision. In *In re Caldwell*, 101 B.R. 728 (Bankr. D. Utah 1989) the court found fraud because the debtor had initially filed a Chapter 13 petition and had prepared a Chapter 13 statement listing assets at about $423,033.00. The debtor then filed a motion to convert to Chapter 12 and submitted a Chapter 12 Statement which omitted a

substantial number of assets. The debtor's testimony and continuing failure to file accurate asset and liability lists supported the court's finding that the omission of the assets and liabilities on the Chapter 12 statement was intentional.

22. In *In re Zurface*, 95 B.R. 527 (Bankr. S.D. Ohio 1989), the court found that the actions of the debtor both pre-petition and post-petition were fraudulent. Prior to filing bankruptcy, the debtors formed a corporation and transferred all assets to the corporation. In addition, a debtor's sister was named trustee of a claimed oral trust which was allegedly created by the corporation for the benefit of the children of the debtors. This trustee had virtually no involvement in or knowledge of the management of the corporation. In fact, the debtor's son dominated and controlled the corporate affairs both before and after the property was conveyed to the corporation. The transfer of the assets to the corporation was made for inadequate consideration. The debtors never requested or obtained salary or other compensation from the corporation for managing the assets. Based upon these facts, the court found that the transfer of assets to the corporation constituted a fraudulent conveyance. Therefore the Chapter 12 Plan was found to not have been proposed in good faith, and the motion to convert to Chapter 7 was granted.

23. In *In re Reinbold*, 110 B.R. 442 (Bankr. D.S.D. 1990), during bankruptcy proceedings, the debtor agreed to surrender certain farm equipment and machinery to a secured party. The debtor then placed the serial plates from the agreed upon property on less expensive property which was then surrendered to the creditor. In addition, the debtor had previously "sold" certain equipment to another person in violation of the security agreement with the secured party. The court found that this improper transfer of property for no consideration was enough evidence of fraud to justify conversion of the case to Chapter 7.

24. Finally, in *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989), *affirmed*, 936 F.2d 376 (8th Cir. 1991), one of the debtors

formed a corporation in which he was the sole incorporator, the president, one of the two directors and the sole shareholder. Thereafter, he conveyed large tracts of real estate and livestock to the corporation for no consideration. Also, a substantial number of promissory notes, deeds of trust and accounts receivable were transferred to the company. The debtor then transferred all the stock of this corporation and another corporation which he controlled to his son as trustee for an irrevocable trust which he established. The son testified that he had received no money, managed no assets and done nothing in regard to the corporations or as to the assets that the corporations purportedly owned. Finally, there was evidence that the debtors had intentionally made misstatements in statements filed with the court. All of these factors lead the court to conclude that the debtors had deliberately perpetrated fraud with the intent to hinder, delay and defraud the creditors.

25. The Fosters argue that their fraud was not as egregious as that of the debtors in *Caldwell, Zurface, Reinbold,* and *Graven,* and therefore conversion was not warranted. However, the Bankruptcy Code does not set a specific threshold of how much fraud or bad faith is sufficient for conversion. What the Bankruptcy Code requires through § 1208(d) is that the Fosters pursue repayment of their debts honestly and in good faith. This the Fosters did not do, and came nowhere close to doing.

26. The Fosters assert that their disobedience of the Bankruptcy Court's Orders based on "uncontroverted evidence before the bankruptcy court was that the then-attorneys for the debtors provided documents for the Fosters to sign which did not contain the agreement of the parties." (Petition for Writ, p. 14). This statement is patently false. There was no evidence before the Bankruptcy Court that the documents the Fosters refused to sign varied one iota from the consensual Chapter 12 Plan. The Fosters own bankruptcy counsel instructed the Fosters to execute the loan documents in order to comply with their Plan. They decided not

to. Further, the Fosters failure to execute the loan documents does not explain their failure to convey and vacate the East Texas Property, in violation of the Confirmation Order and the Dismissal Order.

27. The standard adopted by the Bankruptcy Court for conversion, if deemed implicitly approved by the Fifth Circuit, is not in conflict with any standard adopted by any other court of appeals, nor is such standard so far a departure from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its power of supervision.

D. The Fosters have demonstrated no basis to grant a Writ, as the PCA had standing to seek conversion of the Bankruptcy Case.

28. The PCA had standing to seek conversion of the Bankruptcy Case. Without waiving its argument as to the procedural right of the Fosters to raise this issue which was not raised to the trial court, the PCA would note that the argument that the PCA lacked standing to seek conversion (Petition for Writ, p. 7) is ludicrous at best, if not wholly facetious. Under § 1208(d) of the Bankruptcy code, a party-in-interest may seek conversion. The phrase "party-in-interest" is defined by inclusion in § 1109(b) of the Bankruptcy Code to include but not be limited to "the debtor, the trustee, a creditor's committee, equity security holder's committee, a creditor, an equity security holder, or any indenture trustee. . . ." The PCA is unquestionably a creditor of the Fosters, with a secured debt at the time of the conversion trial in excess of $1,000,000.00.

29. The Fosters make the ridiculous argument that under the confirmed Plan, the PCA would have no unsecured claim, given that the East Texas Property would be conveyed to the PCA, and the debt associated with the West Texas Property would be restructured. Had the Fosters ever intended to or ever attempted to comply with their Plan, then arguably the PCA would not not be an unsecured creditor, but it would still be a secured creditor and therefore a party-in-interest. However, as is blatantly clear from the record, the Fosters have failed to comply with their confirmed Plan.

30. In addition, the term creditor is defined in § 101(9) of the Bankruptcy Code to include an entity that has a claim against a debtor that arose at the time or before the order for relief concerning the debtor. The PCA unquestionably had an unpaid claim against the Fosters that arose at or before the time the order for relief was entered. The fact that the claim happens to be or have been secured does not render the PCA any less a creditor than an unsecured creditor would be. The argument of a lack of standing of the PCA is purely a frivolous and unwarranted argument.

WHEREFORE, the PCA respectfully prays that this Court deny the Petition for Writ of Certiorari, affirm the Order of the Bankruptcy Court Converting Case to Chapter 7, award to the PCA its costs and attorneys' fees incurred in connection with this appeal, and grant to the PCA such other and further relief as may be just and proper under the circumstances.

Respectfully submitted,

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